

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 22, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARK G.,

Plaintiff,

v.

ANDREW M. SAUL, Commissioner
of the Social Security Administration,

Defendant.

No: 1:20-CV-03097-FVS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Kathryn A. Higgs. Defendant is represented by Special Assistant United States Attorney Lars Joseph Nelson. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment, ECF No. 14, **DENIES** Defendant's Motion for Summary Judgment, ECF No. 15, and **REMANDS** the case for to the Commissioner for additional proceedings.

JURISDICTION

Plaintiff Mark G.¹ filed applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) on August 12, 2016, Tr. 76-77, alleging disability since August 10, 2016, Tr. 216, 223, due to prostate cancer, possibility of colon cancer, depression, bipolar, and low hearing, Tr. 244. Benefits were denied initially, Tr. 134-37, and upon reconsideration, Tr. 142-55. A hearing before Administrative Law Judge Virginia Robinson (“ALJ”) was conducted on May 9, 2019. Tr. 49-75. Plaintiff was represented by counsel and testified at the hearing. *Id.* The ALJ also took the testimony of vocational expert Joseph Moisan. *Id.* The ALJ denied benefits on July 19, 2019. Tr. 15-24. The Appeals Council denied Plaintiff’s request for review on June 5, 2020. Tr. 1-5. The matter is now before this Court pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3). ECF No. 1.

BACKGROUND

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner. Only the most pertinent facts are summarized here.

Plaintiff was 59 years old at the alleged onset date. Tr. 216. He received a

¹In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first name and last initial, and, subsequently, Plaintiff’s first name only, throughout this decision.

1 banking operations certificate in 1978 and completed two years of college in 1998.
2 Tr. 245. Plaintiff's reported work history includes jobs as a care provider,
3 customer service at a bank, customer service in retail, food inspector, teaching
4 assistant, and porter. Tr. 245, 262. At application, he stated that he stopped
5 working on August 10, 2016, due to his conditions. Tr. 244.

6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. "The court will uphold the ALJ's
20 conclusion when the evidence is susceptible to more than one rational
21 interpretation." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

1 Further, a district court will not reverse an ALJ's decision on account of an error
2 that is harmless. *Id.* An error is harmless where it is "inconsequential to the
3 [ALJ's] ultimate nondisability determination." *Id.* (quotation and citation omitted).
4 The party appealing the ALJ's decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's
13 impairment must be "of such severity that he is not only unable to do his previous
14 work[,] but cannot, considering his age, education, and work experience, engage in
15 any other kind of substantial gainful work which exists in the national economy."
16 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
21 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(b), 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
6 claimant suffers from "any impairment or combination of impairments which
7 significantly limits [her] physical or mental ability to do basic work activities," the
8 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
9 claimant's impairment does not satisfy this severity threshold, however, the
10 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
11 404.1520(c), 416.920(c).

12 At step three, the Commissioner compares the claimant's impairment to
13 severe impairments recognized by the Commissioner to be so severe as to preclude
14 a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant's impairment does not meet or exceed the
19 severity of the enumerated impairments, the Commissioner must pause to assess
20 the claimant's "residual functional capacity." Residual functional capacity
21 ("RFC"), defined generally as the claimant's ability to perform physical and

1 mental work activities on a sustained basis despite his or her limitations, 20 C.F.R.
2 §§ 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of
3 the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's
5 RFC, the claimant is capable of performing work that he or she has performed in
6 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
7 If the claimant is capable of performing past relevant work, the Commissioner
8 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
9 If the claimant is incapable of performing such work, the analysis proceeds to step
10 five.

11 At step five, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing other work in the national economy.
13 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
14 the Commissioner must also consider vocational factors such as the claimant's age,
15 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
16 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
17 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

21 The claimant bears the burden of proof at steps one through four. *Tackett v.*

1 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
2 the burden shifts to the Commissioner to establish that (1) the claimant is capable
3 of performing other work; and (2) such work “exists in significant numbers in the
4 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
5 700 F.3d 386, 389 (9th Cir. 2012).

6 **THE ALJ’S FINDINGS**

7 At step one, the ALJ found that Plaintiff has not engaged in substantial
8 gainful activity since August 10, 2016, the alleged onset date. Tr. 18. At step two,
9 the ALJ found that Plaintiff has the following severe impairment: hearing loss,
10 with cochlear implantation. Tr. 18. At step three, the ALJ found that Plaintiff does
11 not have an impairment or combination of impairments that meets or medically
12 equals the severity of a listed impairment. Tr. 20. The ALJ then found that
13 Plaintiff has the RFC to perform “medium work as defined in 20 CFR 404.1567(c)
14 and 416.967(c). The claimant must avoid concentrated exposure to excessive
15 noises or very loud noises in an environment where he has to communicate with
16 others.” Tr. 20. At step four, the ALJ found that Plaintiff is capable of performing
17 past relevant work as a caregiver, house manager, and food inspector. Tr. 23.
18 Based on this step four determination, the ALJ concluded that Plaintiff has not
19 been under a disability, as defined in the Social Security Act, from August 10,
20 2016, through the date of his decision. Tr. 24.

21 ///

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying him DIB under Title II of the Social Security Act and SSI benefits under Title XVI of the Social Security Act. ECF No. 14. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly weighed the medical source opinions;
2. Whether the ALJ erred at step two;
3. Whether the ALJ properly addressed Plaintiff's symptom statements; and
4. Whether the ALJ erred at step five.

DISCUSSION

1. Medical Source Opinions

Plaintiff challenges the weight the ALJ assigned to the opinions of Tasmyn Bowes, Psy.D., Douglas Gray, MSW, R.A. Cline, Psy.D., and Robin Ballard, Ph.D. ECF No. 14 at 15-16.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted). Generally, a treating physician's opinion carries more weight than an examining physician's opinion, and an examining physician's opinion carries more weight

1 than a reviewing physician's opinion. *Id.*

2 If a treating or examining physician's opinion is uncontradicted, the ALJ
3 may reject it only by offering "clear and convincing reasons that are supported by
4 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
5 Conversely, "[i]f a treating or examining doctor's opinion is contradicted by
6 another doctor's opinion, an ALJ may only reject it by providing specific and
7 legitimate reasons that are supported by substantial evidence." *Id.* (citing *Lester v.*
8 *Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)). The specific and legitimate standard
9 can be met by the ALJ setting out a detailed and thorough summary of the facts
10 and conflicting clinical evidence, stating his interpretation thereof, and making
11 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
12 required to do more than offer her conclusions, she "must set forth [her]
13 interpretations and explain why they, rather than the doctors', are correct."
14 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

15 **A. Tasmyn Bowes, Psy.D.**

16 On July 26, 2018, Dr. Bowes examined Plaintiff and completed a
17 Psychological/Psychiatric Evaluation for the Washington State Department of
18 Social and Health Services (DSHS). Tr. 457-63. She performed the Rey 15-item
19 Memory Test for Malingering, and Plaintiff scored a 15 suggesting no evidence of
20 malingering. Tr. 458. She administered the Beck Depression Inventory, but
21 Plaintiff became overwhelmed with emotion, and it could not be completed. *Id.*

1 On the Mental Status Exam, she stated that Plaintiff's mood was dysphoric. Tr.
2 461. She diagnosed Plaintiff with persistent depressive disorder, current major
3 depression, severe. Tr. 459. She opined that Plaintiff had a moderate limitation in
4 the abilities to understand, remember, and persist in tasks by following detailed
5 instructions, to perform activities within a schedule, maintain regular attendance,
6 and be punctual within customary tolerances without special supervision, to adapt
7 to changes in a routine work setting, to communicate and perform effectively in a
8 work setting, to maintain appropriate behavior in a work setting, and to complete a
9 normal work day and work week without interruptions from psychologically based
10 symptoms. Tr. 459-60. The term moderate is defined as "a significant limitation
11 on the ability to perform the activity." Tr. 459. She rated Plaintiff's overall
12 severity based on a combined impact of all diagnosed mental impairments to be
13 moderate. Tr. 460. Dr. Bowes opined that Plaintiff would be impaired as stated
14 above for six to twelve months with available treatment. *Id.* She noted that
15 Plaintiff was not engaged in adequate mental health treatment at the time of the
16 examination. *Id.*

17 The ALJ gave the opinion little weight for three reasons: (1) it was
18 inconsistent with the longitudinal evidence; (2) Dr. Bowes saw Plaintiff only once;
19 and (3) Dr. Bowes saw Plaintiff during the period when he was just diagnosed with
20 cancer. Tr. 22-23. None of these reasons were sufficient to meet the lesser
21 standard of specific and legitimate.

1 The ALJ's first reason for rejecting Dr. Bowes' opinion, that it was
2 inconsistent with the longitudinal evidence, is not specific and legitimate. The
3 ALJ found that the opinion was "inconsistent with the longitudinal evidence
4 documented at Finding #3, which reveals no more than mild mental limitations in
5 the psychiatric review technique form." Tr. 23. Finding #3 is the ALJ's step two
6 determination, and contains a paragraph finding that Plaintiff's mental allegations
7 were inconsistent with his longitudinal mental status findings with multiple
8 citations to the record. Tr. 19. The ALJ concluded that this resulted in no more
9 than mild limitations on the "Part B" domains of the Psychiatric Review Technique
10 form (PRTF). *Id.* In doing so, the ALJ failed to discuss how the medical evidence
11 was inconsistent with Dr. Bowes' opinion specifically. *See Embrey*, 849 F.2d at
12 421-22 (The ALJ is required to do more than offer her conclusions, she "must set
13 forth [her] interpretations and explain why they, rather than the doctors', are
14 correct."). By only referring to her determination that Plaintiff had mild
15 limitations in the PRTF, the ALJ failed to explain how Dr. Bowes' RFC opinion
16 was undermined by the PRTF determination or the medical evidence discussed
17 under Finding #3. The false comparison of the PRTF and a medical opinion
18 addressing the RFC is highlighted by internal agency policy clearing stating that
19 the PRTF determination is not equivalent to the RFC determination:

20 The psychiatric review technique described in 20 CFR 404.1520a and
21 416.920a and summarized on the Psychiatric Review Technique Form
 (PRTF) requires adjudicators to assess an individual's limitations and
 restrictions from a mental impairment(s) in categories identified in the

1 “paragraph B” and “paragraph C” criteria of the adult mental disorders
2 listings. The adjudicator must remember that the limitations identified
3 in the “paragraph B” and “paragraph C” criteria are not an RFC
4 assessment but are used to rate the severity of mental impairment(s) at
5 steps 2 and 3 of the sequential evaluation process. The mental RFC
6 assessment used at steps 4 and 5 of the sequential evaluation process
7 requires a more detailed assessment by itemizing various functions
8 contained in the broad categories found in paragraphs B and C of the
9 adult mental disorders listings in 12.00 of the Listing of Impairments,
10 and summarized on the PRTF.

11 POMS DI 24510.006. Without a specific finding that identified what medical
12 evidence undermined specific portions of Dr. Bowes’ RFC opinion, this reason
13 fails to meet the specific and legitimate standard.

14 The ALJ’s second reason for rejecting Dr. Bowes’ opinion, that she only
15 saw Plaintiff once, is not specific and legitimate. The length of treatment
16 relationship and the frequency of examinations is a factor relied upon in how to
17 weigh medical opinions, 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2), and Dr.
18 Bowes only saw Plaintiff for the single evaluation, Tr. 457-63. However, Dr.
19 Bowes’ status as an examining physician dictates the standard the ALJ must meet
20 before rejecting the opinion, *Lester*, 81 F.3d at 830 (“Cases in this circuit
21 distinguish among the opinions of three types of physicians: (1) those who treat the
claimant (treating physicians); (2) those who examine but do not treat the claimant
(examining physicians); and (3) those who neither examine nor treat the claimant
(nonexamining physicians).”), and does not rise to the level of specific and
legitimate itself.

1 The ALJ's third reason for rejecting Dr. Bowes' opinion, that she saw
2 Plaintiff during a period when he was just diagnosed with cancer, is not supported
3 by substantial evidence. The ALJ stated that Plaintiff "had minimal treatment and
4 normal mental status findings since February 2017, an indication that his mental
5 symptoms were acute, situational, and temporary, secondary to situational
6 stressors." Tr. 23. The situational stressor the ALJ refers to is Plaintiff's cancer,
7 which was in remission as of February of 2017. *Id.* The ALJ repeatedly found that
8 Plaintiff's mental health symptoms were secondary to his cancer diagnosis and
9 treatment. Tr. 19, 23. The record supports the finding that the cancer was in
10 remission as of February of 2017. Tr. 479. However, Dr. Bowes' opinion is from
11 July of 2018, over a year later. Therefore, the ALJ's finding that Dr. Bowes saw
12 Plaintiff during a period when he was just diagnosed with cancer, is not supported
13 by substantial evidence.

14 The ALJ failed to provide a specific and legitimate reason for rejecting Dr.
15 Bowes' opinion. Therefore, the case is remanded for the ALJ to properly weigh
16 the opinion.

17 **B. Douglas Gray, MSW**

18 Mr. Gray treated Plaintiff during and after the period Plaintiff was treated for
19 prostate cancer. Tr. 435-38, 455, 501-10 (treated until June of 2017). On February
20 2, 2017, Mr. Gray wrote a letter stating that Plaintiff's "ability to engage in
21 sustained work-related activities is unreliable and unpredictable." Tr. 455. The

1 ALJ gave this opinion little weight. Tr. 22-23.

2 The Court acknowledges that Mr. Gray does not qualify as an acceptable
3 medical source, 20 C.F.R. §§ 404.1502(a), 416.902(a), and that, generally, the ALJ
4 should give more weight to the opinion of an acceptable medial source than to the
5 opinion of an “other source,” such as a counselor. 20 C.F.R. §§ 404.1513(a)(3),
6 416.913(a)(3). However, Mr. Gray is the only treating opinion in the record to
7 address mental health impairments. Since the case is being remanded for the ALJ
8 to properly address the opinion of Dr. Bowes, the ALJ will readdress the letter
9 from Mr. Gray.

10 **C. R.A. Cline, Psy.D. and Robin Ballard, Ph.D.**

11 The remaining medical opinions from Dr. Cline and Dr. Ballard were
12 rejected for the same reason as Dr. Bowes’. Tr. 22-23. However, these two
13 opinions were penned during Plaintiff’s cancer treatment: Dr. Cline evaluated
14 Plaintiff in October of 2016, Tr. 403-08, and Dr. Ballard evaluated Plaintiff in
15 November of 2016, Tr. 419-23. Since Dr. Bowes’ opinion demonstrates that
16 Plaintiff’s impairments potentially continued passed the duration of his cancer
17 treatment, the ALJ will readdress these opinions on remand as well.

18 **2. Step Two**

19 Plaintiff challenges the ALJ’s determination that he had no severe mental
20 health impairments. ECF No. 14 at 5-1

21 Step two of the sequential evaluation process requires the ALJ to determine

1 whether or not the claimant “has a medically severe impairment or combination of
2 impairments.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation
3 omitted). “An impairment or combination of impairments can be found ‘not
4 severe’ only if the evidence establishes a slight abnormality that has ‘no more than
5 a minimal effect on an individual[’]s ability to work.’” *Id.* at 1290.

6 To show a severe impairment, the claimant must first establish the existence
7 of a medically determinable impairment by providing medical evidence consisting
8 of signs, symptoms, and laboratory findings; the claimant’s own statement of
9 symptoms, a diagnosis, or a medical opinion is not sufficient to establish the
10 existence of an impairment. 20 C.F.R. §§ 404.1521, 416.921. “[O]nce a claimant
11 has shown that he suffers from a medically determinable impairment, he next has
12 the burden of proving that these impairments and their symptoms affect his ability
13 to perform basic work activities.” *Edlund v. Massanari*, 253 F.3d 1152, 1159-60
14 (9th Cir. 2001). At step two, the burden of proof is squarely on the Plaintiff to
15 establish the existence of any medically determinable impairment(s) and that such
16 impairments(s) are severe. *Tackett*, 180 F.3d at 1098-99 (In steps one through
17 four, the burden of proof rests upon the claimant to establish a prima facie case of
18 entitlement to disability benefits.).

19 In her step two determination, the ALJ found that Plaintiff had a single
20 physical impairment: hearing loss, with cochlear implantation. Tr. 18. The ALJ
21 also found that Plaintiff’s alleged depression, anxiety, and bipolar disorder were

1 nonsevere for the following reasons: (1) the mental symptoms “appeared acute,
2 temporary, and situational”; (2) the mental health impairments were inconsistent
3 with his minimal mental health treatment; (3) the mental health allegations were
4 inconsistent with the claimant’s longitudinal mental status findings; and (4)
5 Plaintiff’s allegations were inconsistent with his activities. Tr. 19.

6 Throughout her determination, the ALJ found that Plaintiff’s mental health
7 impairments were secondary to his cancer diagnosis and all symptoms ended when
8 his cancer went into remission. Tr, 19, 23. However, this is not supported by
9 substantial evidence. The record includes a DSHS evaluation dated over a year
10 since Plaintiff’s cancer was in remission that includes a diagnosis of depression
11 resulting in moderate limitations in work abilities. Tr. 457-63. As part of the
12 evaluation, Dr. Bowes completed objective testing, including the Rey 15-item
13 Memory Test for Malingering, the Beck Depression Inventory, and a Mental Status
14 Exam. Tr. 458, 461. Therefore, Plaintiff has set forth the evidence required under
15 20 C.F.R. §§ 404.1521, 416.921 to establish a medically determinable mental
16 health impairment that continued after his cancer was in remission. This
17 evaluation and the resulting opinion is to be readdressed by the ALJ on remand.
18 Therefore, the ALJ’s determination that Plaintiff’s mental health impairments
19 ceased when his cancer went into remission is in question and must be addressed
20 further on remand.

21 The ALJ’s second reason for finding Plaintiff’s mental health impairments

1 were nonsevere, that the allegations were inconsistent with his minimal mental
2 health treatment, cannot support the ALJ's step two determination. The Ninth
3 Circuit has repeatedly held that "it is a questionable practice to chastise one with a
4 mental impairment for the exercise of poor judgment in seeking rehabilitation."
5 *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

6 The ALJ's third reason for finding Plaintiff's mental health impairments
7 were nonsevere, that they were inconsistent with the longitudinal mental status
8 findings, is not supported by the record. Again, the ALJ asserts that following his
9 cancer treatment, Plaintiff's mental health symptoms disappeared. Tr. 19. As
10 addressed above, this is not supported by the record.

11 The ALJ's fourth reason for finding Plaintiff's mental health impairments
12 were nonsevere, that they were inconsistent with his reported activities, is
13 misleading. First, the ALJ failed to discuss the reported activities that
14 demonstrated that Plaintiff's mental health impairments were hindering his
15 activities. The fact that Plaintiff had difficulty attending his cancer treatment
16 appointments. Tr. 455. He repeatedly reported suicidal thoughts. Tr. 408, 457-58.
17 The ALJ's conclusion that the ability to drive, shop, live independently, and attend
18 church services, Tr. 19, is not inconsistent with presence of a severe mental health
19 impairment at step two.

20 Likewise, Plaintiff's attempt to work that was cut short due to layoffs and
21 not Plaintiff's mental health impairments, Tr. 19, does not support a finding that

1 his mental health impairments were not severe at step two. Here, the ALJ is
2 applying the incorrect standard at step two: that since Plaintiff's mental health
3 impairments were not work preclusive, they are not severe. The correct standard is
4 "[a]n impairment or combination of impairments can be found 'not severe' only if
5 the evidence establishes a slight abnormality that has 'no more than a minimal
6 effect on an individual[']s ability to work.'" *Smolen*, 80 F.3d at 1290. As such,
7 the ALJ will readdress his step two determination regarding Plaintiff's mental
8 health impairments at step two.

9 **3. Plaintiff's Symptom Statements**

10 Plaintiff challenges the ALJ's treatment of his symptom statements. ECF
11 No. 14 at 12-14.

12 It is generally the province of the ALJ to make determinations regarding the
13 reliability of Plaintiff's symptom statements, *Andrews v. Shalala*, 53 F.3d 1035,
14 1039 (9th Cir. 1995), but the ALJ's findings must be supported by specific cogent
15 reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
16 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
17 testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
18 *Lester*, 81 F.3d at 834.

19 The ALJ found Plaintiff's "statements concerning the intensity, persistence,
20 and limiting effects of these symptoms are not entirely consistent with the medical
21 evidence and other evidence in the record for the reasons explained in this

1 decision.” Tr. 20. The evaluation of a claimant’s symptom statements and their
2 resulting limitations relies, in part, on the assessment of the medical evidence. *See*
3 20 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, in light of the case
4 being remanded for the ALJ to readdress the medical source opinions in the file, a
5 new assessment of Plaintiff’s subjective symptom statements will be necessary.

6 **4. Step Five**

7 Plaintiff challenges the ALJ’s step five determination. ECF No. 14 at 16-20.
8 The ALJ denied the claim at step four. Tr. 23-24. Therefore, there was no step
9 five determination, and the burden never shifted to the Commissioner. However,
10 the case is being remanded to readdress the medical opinions and Plaintiff’s
11 symptom statements. Therefore, a new RFC determination will be required and a
12 new step four determination will be made. If the claim is not resolved at step four,
13 then the ALJ will make a step five determination.

14 **CONCLUSION**

15 Plaintiff requests that the Court remand the case for an immediate award of
16 benefits. ECF No. 14 at 20.

17 The decision whether to remand for further proceedings or reverse and
18 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
19 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
20 where “no useful purpose would be served by further administrative proceedings,
21 or where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*

1 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by
2 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280
3 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (noting that a
4 district court may abuse its discretion not to remand for benefits when all of these
5 conditions are met). This policy is based on the “need to expedite disability
6 claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that
7 must be resolved before a determination can be made, and it is not clear from the
8 record that the ALJ would be required to find a claimant disabled if all the
9 evidence were properly evaluated, remand is appropriate. *See Benecke*, 379 F.3d
10 at 595-96; *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

11 The Court finds that further administrative proceedings are appropriate. *See*
12 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)
13 (remand for benefits is not appropriate when further administrative proceedings
14 would serve a useful purpose). Here, the ALJ should make a new step two
15 determination addressing Plaintiff’s mental health impairments, readdress the
16 medical opinions in the record concerning Plaintiff’s mental health impairments,
17 readdress Plaintiff’s symptom statements, and make a new RFC determination. In
18 addition, the ALJ should supplement the record with any outstanding medical
19 evidence and take additional testimony from a vocational expert at any remand
20 proceedings.

21 ///

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is **GRANTED**,
3 **in part**, and the matter is **REMANDED** to the Commissioner for
4 additional proceedings consistent with this Order.

5 2. Defendant's Motion for Summary Judgment, ECF No. 15, is **DENIED**.

6 The District Court Clerk is directed to enter this Order and provide copies to
7 counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

8 DATED this 22nd day of June 2021.



12 *Stanley A. Bastian*

13 Stanley A. Bastian
14 Chief United States District Judge